LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
APR 3 1972
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM 1971

No. 71-1262

SAM A. HERSCOVITZ,

*Petitioner,*

*v.*

BOARD OF COMMISSIONERS OF THE UTAH STATE BAR,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF UTAH

HERBERT MONTE LEVY
*Attorney for Petitioner*
295 Madison Avenue
New York, N. Y. 10017

## TABLE OF CONTENTS


| | PAGE |
|---|---|
| OPINIONS BELOW | 2 |
| JURISDICTION | 2 |
| QUESTIONS PRESENTED FOR REVIEW | 2 |
| CONSTITUTIONAL PROVISIONS AND REGULATIONS INVOLVED | 6 |
| STATEMENT OF THE CASE | 6 |
| A. Reliable Furniture Company | 9 |
| B. Security Development | 11 |
| C. T.C. Associates | 11 |
| D. R.C. Interiors, d/b/a Pro Discount | 12 |
| E. Other Legal Actions | 15 |
| F. Inability to Recollect a Letter Written 32 Years Ago | 15 |
| G. Testimony as to Reputation | 16 |
| H. Reputation in the Ecclesiastical Community | 17 |
| I. Transfer of Assets | 17 |
| REASONS WHY WRIT SHOULD BE GRANTED: | |
| *Point I*—The State's denial of the right to examine evidence during a Bar Admission Hearing, and to cross-examine thereon, with subsequent State use of such evidence upon court review, clearly conflicts with applicable decisions of this Court | 21 |

PAGE

*Point II*—There was no evidence whatsoever of bad moral character below. The items found to indicate suspicion of petitioner's moral character have no rational connection with petitioner's fitness or capacity to practice law, and denial of admission to the bar for such reasons conflicts with the due process clause of the Fourteenth Amendment and with prior decisions of this Court ..... 21

A. Findings Completely Lacking Evidentiary Support ..... 22

B. Matters Which Have No Rational Connection With Petitioner's Moral Character ..... 23

1. The use of judicial forums ..... 23

2. The use of post-dated checks ..... 25

3. Petitioner's being questioned as to whether the fire at Reliable was accidental ..... 25

4. The trust receipts ..... 26

5. Forgetting a 32-year old letter ..... 26

6. Petitioner's reputation in the "ecclesiastical" and business communities ..... 26

7. Transfer of assets ..... 27

8. The financial statement of T.C. Associates ..... 28

*Point III*—The statutory standard, permitting denial of qualification for the bar because of failure to remove any and all reasonable suspicions of moral unfitness, is in conflict with the applicable decisions of this Court ..... 29

PAGE

*Point IV*—The miscellaneous factors relied upon below when taken together cannot make constitutional that which is unconstitutional when each is considered separately ..... 30

CONCLUSION ..... 31

APPENDIX:

A ..... 1a

B ..... 8a

C ..... 10a

D ..... 12a

E ..... 13a

F ..... 14a

**Cases Cited**

Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673 (1930) ..... 20

D.H. Overmyer Co., Inc. v. Frick Co., —— U.S. ——, 40 LW 4221 ..... 25

Morningstar v. Lafayette Hotel Co., 211 N.Y. 465, 468, 105 N.E. 656, 657 ..... 23

Papachristou v. City of Jacksonville, —— U.S. ——, 40 LW 4216 ..... 25, 30

Reliable Furniture Co. v. American Home Assur. Co., 24 Utah 2d 93, 466 P. 2d 368 (1970) ..... 10

Reliable Furniture Co. v. Fidelity & Guar. Ins. Under., 16 Utah 2d 211, 398 P. 2d 685 (1965) ..... 10

Schware v. Board of Bar Examiners, 353 U.S. 232 (1957) ..... 22, 23, 25, 27, 29, 31

PAGE

Security Development Company v. Fedco., Inc. & F.A.I.M., 23 Utah 2d 306, 462 P. 2d 706 (1969) ..... 11

Stromberg v. California, 283 U.S. 359 ..... 30

Swarb v. Lennox, —— U.S. ——, 40 LW 4227 ..... 25

Terminiello v. Chicago, 337 U.S. 1 (1949) ..... 30

United Factors v. T.C. Associates, Inc., 21 Utah 2d 351, 445 P. 2d 766 (1968) ..... 12

Williams v. North Carolina, 317 U.S. 287 ..... 30

Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963) ..... 21

**United States Constitution Cited**

Fifth Amendment ..... 20

Fourteenth Amendment ..... 3, 6, 20, 21

**Statutes Cited**

Federal Bankruptcy Laws ..... 3

Ch. XI ..... 12

28 U.S.C.:

Sec. 1257(3) ..... 2

**Rule Cited**

Revised Rules of the Utah State Bar for Admission to the Bar:

IX ..... 6, 29, 30

IN THE

# Supreme Court of the United States

OCTOBER TERM 1971

No.

SAM A. HERSCOVITZ,

*Petitioner,*

*v.*

BOARD OF COMMISSIONERS OF THE UTAH STATE BAR,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF UTAH

*To the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

Your Petitioner, Sam A. Herscovitz, hereby petitions for a writ of certiorari to review the decision of the Supreme Court of the State of Utah denying permission to the Petitioner to take the bar examination in such State, despite overwhelming evidence of Petitioner's good moral character, which denial was premised on the finding that Petitioner did not remove "any and all reasonable suspicions of moral unfitness", because of one or more cor-

porate business failures in his 35-year business career and other reasons also unrelated to moral character, though Petitioner had never been convicted, arrested, nor charged with any crime.

## Opinions Below

There was no opinion rendered in the Supreme Court of Utah. Appended hereto as Appendices A and B respectively are the Findings of the administrative agency in this case, the Board of Commissioners of the Utah State Bar, and its Amendment thereof. Annexed hereto as Appendix C is the order of the Supreme Court of Utah agreeing to proceed by writ of mandamus and denying Petitioner's motion to strike certain exhibits. Annexed hereto as Appendices D and E respectively are its orders denying mandamus and denying rehearing.

## Jurisdiction

The order sought to be reviewed was made and entered on February 1, 1971. An order denying a timely motion for rehearing was made and entered on November 5, 1971. On January 5, 1972, Mr. Justice White of this Court granted an order extending the time for filing a petition for writ of certiorari up to and including March 6, 1972. On February 28, 1972, Mr. Justice White further extended such time to and including April 3, 1972. The statutory provision believed to confer on this Court jurisdiction to review the judgment in question is 28 U.S.C. §1257(3).

## Questions Presented For Review

1. Whether the examination and use by the Board of Commissioners of the Utah State Bar and by the Supreme

Court of Utah of confidential information, neither said information nor its nature nor a summary thereof being disclosed to the applicant for bar admission prior to hearing nor before the Board arrived at its decision, but being disclosed to the Supreme Court of Utah upon the applicant's petition for mandamus, without any opportunity to confront and cross-examine his accusers thereon is inconsistent with the due process of law required by the Fourteenth Amendment to the United States Constitution.

2. Whether a State may, consistent with said due process of law, deny permission to take the Bar examination to a man whose high moral character and reputation was attested to by some forty broadly-based business leaders, attorneys and judges, who has a distinguished record of numerous community activities (*e.g.*, a regional founder of B'nai B'rith, a state director of the American Civil Liberties Union, a state director of USO, a state director of the American Jewish Congress, and a member of the National Jewish Welfare Board), who has neither been convicted, arrested, nor ever accused of a crime, never had an unsatisfied judgment against him, and never took personal advantage of the Federal Bankruptcy Laws, because the Bar Commission found after a hearing—at which the only witnesses against Petitioner were persons then or previously involved in litigation against Petitioner—, that in Petitioner's thirty-five years of business experience:

(a) He had once been questioned as to whether a fire at his corporation's business premises was accidental;

(b) At or shortly prior to the time of the fire, postdated checks of his business corporation may not have cleared;

(c) Petitioner's corporation sued through counsel to set aside a fire insurance settlement on the ground

of coercion and intimidation, which action is still pending, after two decisions in the corporation's favor by the Utah Supreme Court;

(d) One or more corporate business ventures with which he had been associated filed federal petitions in bankruptcy;

(e) One of his corporate business ventures sued for breach of a lease agreement, such litigation being still pending, after a decision in the corporation's favor by the Utah Supreme Court;

(f) He unsuccessfully attempted through counsel to set aside a stipulation he had entered into;

(g) A corporate financial statement prepared by a certified public accountant, signed by applicant in reliance upon the accountant, turned out to be inaccurate;

(h) Funds for items financed through trust receipts by a corporation with which he had been previously associated were not segregated by it, and the items not paid for, when petitioner was no longer a corporate employee, though such segregation was not required by the creditor, and the creditor knew of no instance where any other person had so segregated;

(i) Petitioner signed a "personal guarantee" thereof, but through counsel denied its legal effect, claiming it had been signed in blank for a different purpose, in a matter still pending in the courts;

(j) Petitioner allegedly failed to make a full disclosure to the bankruptcy court re such personal guarantee—though the minutes of the bankruptcy court proceeding demonstrate the contrary;

(k) Because applicant or corporations with which he has been connected allegedly have been involved in legal actions where there are unsatisfied judgments—though there are no unsatisfied judgments against Petitioner;

(l) Petitioner failed to remember a letter that he had written 32 years previously;

(m) He had shown a personal net worth of approximately $156,000 in 1963 and in the next two years disposed of all his assets, turning over a substantial portion to his wife—though no creditor of his was alleged or shown to have suffered thereby; and

(n) "Although Applicant appears to enjoy a good reputation among his family, friends, and associates in the ecclesiastical community in which he is active [Jewish], he has a very poor business reputation among those with whom he has dealt in buying merchandise for resale and in the field of credit and finance and elsewhere where he would be expected to be more directly involved if he were licensed to practice law," when the only persons amongst whom he has a poor business reputation are creditors (and their attorneys) who incurred losses through corporations with which petitioner had been associated, and the insurance people he had sued, and such reputation was undeserved, though his reputation in business, the community, and amongst all other lawyers and judges is excellent, such reputation being ignored.

3. Whether a State may, consistently with the said due process clause, deny permission to take the bar examination, unless the Applicant proves "that he is possessed of good moral character and is entitled to the high regard

and confidence of the public, and of removing any and all reasonable suspicions of moral unfitness," or whether such standard, embodied in Rule IX of the Revised Rules of the Utah State Bar for Admission to the Bar, is repugnant to the aforesaid due process clause.

4. Whether, even if the use of one or two of the standards set forth above in "2" under the said circumstances is consistent with the due process clause of the Fourteenth Amendment to the United States Constitution, the use of the other standard or standards which is inconsistent with the aforesaid due process clause does not invalidate the proceedings and require a new hearing.

## Constitutional Provisions and Regulations Involved

The applicable provisions of Rule IX of the Revised Rules of the Utah State Bar for Admission to the Bar are lengthy; their pertinent text is set forth in Appendix F hereto. The due process clause of the Fourteenth Amendment is also involved, and its pertinent text is also set forth in said Appendix F.

## Statement of the Case

Petitioner, who had unsuccessfully taken the bar examination after appropriate certification of his good character by the Board of Commissioners of the Utah State Bar in the late thirties and again in 1968 (T 135-140)*, again applied for permission to take the bar examination. In a letter dated January 29, 1970, he was advised that the Board of Commissioners was not prepared to certify that he was of good moral character as required by the Revised Rules of the Utah State Bar for

* Such references are to pages in the record as filed here.

Admission to the Bar (T 380). Upon Petitioner's request for a hearing, he was advised in a letter from the Utah State Bar, dated February 9, 1970, that "At the Commission meeting where the matter of your application was considered, the Commission considered the report of the Second Division Investigative Committee which recommended that you not be allowed to take the examination based upon bad reputation and unethical business practice; and adverse statements of David K. Holther, John H. Allen, Ray Twelves, Alvin I. Smith (T 383).

The Investigative Committee report was not presented at the hearing, though demands were made to produce any documents used by the Board's attorney (T 180). Mr. Holther did not testify, but was quoted as saying that he had no opinion one way or the other, is personally biased, but that was the extent of it. Mr. Allen did not testify, but was quoted as saying that he knew nothing about the Petitioner, and never said anything adverse (T 65-6). Nor did Mr. Twelves testify. The President of the State Bar stated that it would be required to present anything adverse to Petitioner, who could rebut such evidence if necessary (T 66-7, 180).

With his application, Petitioner filed letters of character reference from two district judges and eight attorneys, as well as a petition in support of his character signed by a district judge, a juvenile court judge, and eleven additional attorneys (T 14-25, 376). One of the letters submitted was from Keith E. Murray, Esq., who wrote individually and as President of the Weber County Bar Association (T 22).

Petitioner's moral character and reputation was testified to as being excellent by the Executive Vice President and General Manager of the Ogden Standard Examiner, who knew petitioner for nineteen years (T 67-73); by the former Chairman of the Democratic Party in Peti-

tioner's County, a retired Colonel, who was also the sergeant at arms in the House and was the Branch Manager for the State Tax Commission, who had known petitioner since he was fifteen (T 79-88); by another retired Air Force Colonel, currently the Executive Director of the Weber County Industrial Development Bureau, National Director of the Air Force Association, and Trustee of the Aerospace Education Foundation (T 75-6); by the Director of the OEO-funded Legal Services Program in Ogden, Utah, who knew petitioner since the late 1930's (T 89-96); by an attorney who knew him for twenty-four years (T 103-5); by a clothing merchant, the President of B'nai B'rith, who knew petitioner since 1944 (T. 109-10); by the Chief Deputy Assistant District Attorney (T 114-15); and by the Past President of the Weber County Bar Association and former Chairman of the Disciplinary Committee for the Utah State Bar Commission (T 224).

Petitioner's involvement in community activities was shown by the fact that he was one of eleven State Directors of USO, active in the Ogden Chamber of Commerce, active in the Jewish community, a founder of the Anti-Defamation League of B'nai B'rith, and most active in it (T 69), a charter member and founder in 1939 of B'nai B'rith and of the Ogden Jewish Community Welfare Fund, a member of the Executive Committee of Retail Merchants, past National Representative on the USO Council, past President of the 20-30 Club, a founder of the Committee for Civic Unity (T 131), presently a Trustee of the Social Service Council in Ogden, one of eleven Trustees of a non-profit Housing Development Corporation from which he receives no money, a second-term elected Director of the American Civil Liberties Union in Utah, on the National Jewish Welfare Board, and Area Director for the American Jewish Congress* (T 131-3).

---

* The transcript incorrectly denotes this as the "National" Jewish Congress.

Reliable Furniture Company, managed by Petitioner, was the first, and one of the only two furniture stores in the United States to receive an award from the American Carpet Institute as an outstanding ethical competent advertising organization. Petitioner further won the first honor award for the outstanding contribution he had made to advertising in the furniture industry, was a Council Member of the American Carpet Institute for two years, representing thirteen western states (T 133), and had recently lectured on advertising and credit to the Western Carpet Association Dealers (T 133-4). He had never been arrested, convicted, nor charged with any crime (T 134).

The testimony showed that the petitioner is 56 years of age, and that he had been engaged in various business ventures from about 1934 up to January, 1969 (infra, p. 2a).

The evidence showed the following in regard to the matters specified below.

**A. Reliable Furniture Company**

Petitioner was the President of Reliable Furniture Company (T 137), owning some 36% of its stock (T 207). Reliable was one of the ten most important accounts of the Ogden Standard Examiner, and was always current in its payments to the newspaper (T 70-72). For some ten or fifteen years prior to a 1961 fire, post-dated checks had been used as a means of financing; subsequent to the fire, a few of these may not have been honored for payment because they were either deposited prematurely or erroneous estimates had been made of Reliable's prospective cash flow (T 191, 195-7).

The fire was investigated, during the course of which investigation petitioner was questioned as to the origin of the fire; no charge was ever brought against him (T

145). The matter was never presented to the District Attorney's office (T 122). All insurance companies but two immediately paid the claims. However, with the same insurance agent representing the other two insurers, Reliable was unable to secure the $85,000 check for inventory loss, already made out and in the agent's possession, unless it took the comparatively nominal sum of $12,900 for its actual business interruption loss of $128,000. Faced with this dilemma, Reliable—without advice of counsel (T 159),—accepted the nominal amount, and thereupon commenced legal action claiming coercion and intimidation in connection with the settlement (T 142, 155-6). This matter, handled through counsel, was still pending in the courts at the time of the hearing, the matter having been twice before the Supreme Court of Utah, which had ruled twice in favor of the plaintiff. *Reliable Furniture Co.* v. *Fidelity & Guar. Ins. Under.*, 16 Utah 2d 211, 398 P. 2d 685 (1965); *Reliable Furniture Co.* v. *American Home Assur. Co.*, 24 Utah 2d 93, 466 P. 2d 368 (1970). Four out of five jury members polled would have returned a verdict for petitioner (T 146).

Reliable was solvent at the time of the fire, and continued to operate for a year thereafter (T 154). The corporation is still in existence (T 148, 161), though inactive; it is not in receivership nor bankruptcy (T 162). Of the $60,000-$70,000 in claims against it (T 202), one leading creditor represents some $50,000, and petitioner is on the best of terms with such creditor. All its creditors will be paid. The defense of the Statute of Limitations has been waived (T 161). All employees of Reliable had been kept on the payroll when the business was closed for 47 days after the fire (T 155).

**B. Security Development**

In 1955, a corporation was formed known as Security Development, in which petitioner and his wife had a controlling interest (T 162-3).

The corporation instituted legal action, through counsel, to recover damages against its lessor, the F.A.I.M. Department Store, on the grounds that it had been allocated a much smaller amount of space than the lease called for (T 162-4). The decision of the trial judge dismissing the complaint was reversed by the Supreme Court of Utah (T 146-7, 162). *Security Development Company* v. *Fedco., Inc. & F.A.I.M.*, 23 Utah 2d 306, 462 P. 2d 706 (1969). The corporation is still in existence (T 148), is solvent (T 104), has no obligations and is in good standing (T 162).

**C. T.C. Associates**

Petitioner owned 55% of the corporation, T.C. Associates, which operated a general retail furniture business (T 148-9, 167). Petitioner managed the company (T 167).

A litigation was begun against T.C. Associates, with its attorney accepting service of process. Before the time for the defendant T.C. Associates to answer had expired, its attorney suddenly became ill and was hospitalized. Petitioner had not even known that the lawsuit had been begun until after plaintiff took a default (T 150-1), the relief awarded to the plaintiff on such default including a State insolvency proceeding. Though the default was vacated, the State insolvency proceeding was not vacated (T 150).

To avoid the State insolvency, especially since the receiver in the State insolvency proceeding was the brother of the partner of the creditor's attorney (T 328-9), T.C.

Associates, following the advice of its attorney (T 207, 223), instituted a Chapter XI proceeding under the Bankruptcy Laws in the Federal Court (T 91-3), in 1966 (Exh. 6). The Bankruptcy Court continued the salary which petitioner had been paid (T 200). However, the Chapter XI was unsuccessful and the proceedings terminated in bankruptcy.

T.C. Associates was discharged in bankruptcy (T 219). Petitioner and his family lost some $40,000 in this venture (T 202).

1. *Stipulation and Agreement*

T.C. Associates had been sued by one United Factors. Petitioner signed an agreement to make certain payments to the plaintiff therein. Later, upon advice of counsel, petitioner moved to set aside the stipulation. His counsel appealed the denial of the requested relief to the Supreme Court of Utah, which affirmed. *United Factors* v. *T.C. Associates, Inc.*, 21 Utah 2d 351, 445 P. 2d 766 (1968). The judgment was then paid (T 329).

2. *Financial Statement*

A statement of the proposed stock structure of T.C. Associates submitted to United Factors had been signed by a Certified Public Accountant. The petitioner, in reliance upon the certification, also signed the statement (T 354-5). Later, the others who had agreed to purchase stock backed out of their agreement, and so the stock structure was not what had been originally anticipated (T 353-4).

**D. R.C. Interiors, d/b/a Pro Discount**

This corporation, begun in 1967 or 1968, was one in which petitioner owned no stock. He was the President

thereof in 1968, drawing an annual salary of $2,500 (T 151). The petitioner terminated his connection with R.C. Interiors as of December 31, 1968 (T 151). In 1969 the petitioner did not draw any salary, although he was still listed as its President and agent. He was instead working as a law clerk. The petitioner's testimony was confirmed by an attorney, Brown, who had filed a claim against R.C. Interiors. He admitted that records had been turned over in the bankruptcy proceedings to show petitioner's salary from R. C. Interiors had been less than $3,000 in 1968, and that he had not drawn a salary in 1969 (T 270-1). A Petition in Bankruptcy was filed for the corporation in December 1969 or January 1970 (T 151-2).

1. *The Trust Receipts*

Part of the R.C. Interiors financing was done by Trust Receipts, under which the funds received from the sale of merchandise were to be held "in trust", and immediately paid upon retail sale of the item financed. In some cases, the moneys were not immediately remitted by R.C. Interiors, and some of the items were sold "out of trust", all after petitioner's employment terminated (T 235, 237, 309). The uncontradicted testimony showed that no businessman had ever actually segregated funds resulting from sales financed by Trust Receipts (T 269), nor was he expected or required to (T 309). Unsold merchandise was returned to creditors by R.C. Interiors (T 312).

2. *The "Personal Guaranty"*

An action was begun, which is still pending, by Western Supply against R.C. Interiors and petitioner as an alleged guarantor (T 171). Petitioner testified that the so-called guaranty had been signed in blank and had not been intended to cover sales to R.C. Interiors (T 174-5).

### 3. *Disclosure to Bankruptcy Court re Personal Guaranty*

Petitioner fully disclosed the existence of the alleged personal guaranty and his denial of the legal effect thereof during the course of the bankruptcy proceedings at the First Meeting of Creditors, as shown by stenographic minutes (quoted in the margin below), which is part of the record hereof.[1] The attorney for the creditor, Smith,

---

[1] "Q. On some of the obligations of the R.C. Interiors, you have given your personal guaranty, is that correct?

A. (By Petitioner) Is that material?

Q. I'm asking you if that's correct.

Mr. Vlahos [Attorney for Petitioner]: They're disputed your honor, so the record we have [—]

Mr. Herscovitz: They are disputed and I do not care to go into that subject.

Mr. Arnovitz: We'll ask the Court to direct the witness to answer the question.

The Court: Well, let's talk about that, had there been some to whom the corporation was indebted to for the purchase of materials to be sold at retail, to whom you may also be obligated?

A. It's possible in their minds I might be obligated. It's very possible.

The Court: That's something that is currently in dispute:

A. That's correct.

The Court: And who are those that are claiming that?

A. I don't know, I know Western is one.

The Court: Are there others that you know of, who claim you may be personally obligated?

A. That's the only one I know, in which they have filed an action, in which they have named me and the corporation.

*(Footnote continued on following page)*

(T 252) testified at the hearing before the Board of Bar Commissioners that such a full disclosure had not been made, that petitioner had specifically denied giving any guarantee to anyone (T 273-4); but Kesler, the trustee in bankruptcy (T 284), testified to the contrary (T 285). The stenographic minutes confirmed the accuracy of the trustee's statement (see n.1 in the margin below).

**E. Other Legal Actions**

The only other legal action not set forth above mentioned in the record is a judgment of $14,000 against R.C. Interiors in favor of Prestige Furniture (T 188). There was no evidence of any unsatisfied judgment against petitioner.

**F. Inability to Recollect a Letter Written 32 Years Ago.**

Petitioner mentioned that he had only recently learned that his moral character had been questioned when he had attempted to take the Bar examination in 1938. He was thereupon shown a letter complaining of an investigation which he had sent on December 15, 1938. He admitted that his recollection was in error (T 175-8). His moral character had been certified favorably after he had sent the letter (T 139).

---

*(Footnote continued from preceding page)*

Q. Do you know of any obligee of the corporation to whom you may have given a personal guaranty?

A. Only in the sense that in dealing for the corporation, then some allege they were dealing with me.

Q. This is a question of [li]ability in this type of thing. Do you know of any to whom you may have given a written personal guaranty?

A. As far as I know there is no other written guaranty."

(Unnumbered Exhibit, pp. 23-4 thereof, in envelope in Vol. 3 of Record on Appeal.)

**G. Testimony as to Reputation.**

In addition to the testimony as to the excellence of his reputation which had been given by judges, lawyers, a District Attorney, and varying businessmen, the Board of Bar Commissioners produced on the witness stand the following witnesses:

1. The credit manager for Western Supply, Mr. Lines, which was currently suing petitioner on the alleged guaranty (*supra*, p. 13). He had no personal knowledge as to the alleged "guaranty" which was executed before the witness had been employed by Western Supply. He further testified that petitioner did not appear to have done anything dishonest (T 315), although he considers a person dishonest if he doesn't pay a bill (T 317).

2. Attorney Brown, who had filed a claim of about $18,000 for Western Supply in the R.C. Interiors bankruptcy (T 252), admitted that the original complaint against petitioner on the alleged personal guaranty had erroneously been filed in the amount of $63,000, and should be reduced to $18,000 (T 258). He made no comment about petitioner's character.

3. Mr. Kesler, Trustee in Bankruptcy of R.C. Interiors. He testified that though in each of petitioner's ventures there had been a corporation, people tend to impute the corporation's reputation to its officers or managers, and so petitioner's credit reputation amongst suppliers is not good (T 287-8). Adverse comments all came from people who had lost money (T 291), or from the insurance agents being sued in connection with the settlement of Reliable (T 292-295).

4. The Board presented the testimony of Attorney Smith, whose partner was currently representing F.A.I.M. in its lawsuit with Security Development (T332), and who

handled other suits against petitioner's corporations (T 331-2). He stated that he had not testified to petitioner's reputation in the community for truth, veracity and honesty, but was only testifying that petitioner's reputation in the community of creditors that Mr. Smith represented was bad, as far as financial matters were concerned, because these people had lost money in dealing with petitioner's corporation (T 333-4).

5. The only other adverse witness was a Mr. White, who had operated F.A.I.M. (T 337).

### H. Reputation in the Ecclesiastical Community

There was no testimony given as to petitioner's reputation "in the ecclesiastical community in which he is active" (Jewish) (T 134).

### I. Transfer of Assets

Attorney Smith testified that in a 1967 examination in supplemental proceedings, he introduced a 1965 financial statement of petitioner's showing a net worth of $156,000, and that petitioner testified that of all assets listed, he had fifty cents left (T 302), that he said some $80,000 was transferred to petitioner's wife on previous liabilities owing to his wife, and could not answer in the absence of his counsel why he had not shown such liabilities (T 303).

The stenographic minutes of the 1967 examination, Ex. 5 (introduced in evidence at T 305) (found in the envelope in Vol. 3 of the record filed herewith) show no reference by petitioner to having fifty cents left, nor as to being unable to answer such question by reason of counsel's absence. Those minutes show that a $60,000 note receivable from Security Development had been transferred to his wife for moneys previously borrowed from his wife,

that he had not shown this as a liability on his financial statement (Ex. 4) because he didn't consider this as necessarily a liability (Ex. 5, pp. 9-10); that $8,500 in listed stocks had been sold to pay obligations to creditors (*id.* at 10); that most of the officers of another corporation, Intermountain Liquidators, had disappeared with some $8,200 of its assets (*id.* at 11); that his $32,000 home first jointly owned by his wife and himself had been transferred to his wife, who recently sold it, the transfer of title to her being publicly recorded (*ibid.*); that re the cash surrender value of life insurance of $36,565, some policies were no longer in effect, and the cash value of the remaining ones had been borrowed (*id.* at 10-11).

In any event, the judgment against petitioner was fully bonded by a corporate surety company,[2] and the judgment (see *supra* p. 12, item C1) paid. No creditor was either alleged to, or shown to, have suffered by reason of the transfer of petitioner's assets (T 304).

The Board of Bar Commissioners later handed down its findings (T 384-9), reproduced *infra* at pages 1a-7a; exceptions were duly noted to these findings, taken before the Board itself (T 390-5), which ruled negatively thereon (T 397) (*infra*, p. 8a-9a).

Thereafter, the record as designated in the Supreme Court of Utah by the Board included varying items which had neither been set forth, referred to, nor produced at the hearing before the Board, including:

a) a letter from attorney Holther, who never appeared as a witness, disqualifying himself as a member of the

---

[2] Mr. Smith intimated that the supersedeas bond was posted to avoid disclosure of petitioner's income tax returns (T303-4). However, petitioner has unsuccessfully attempted to have his tax returns included as part of the record here.

Investigative Committee, who was involved in litigation against a corporation of petitioner's, stating that petitioner "is a man without principal, devious; and his word, promises and commitments are honored only in their breach", and noting that he is "so adversely prejudiced against this individual that I cannot impartially assess him." (T 365)

b) the report of the Investigating Committee, Second Judicial District (T 367) stating its "opinion that Mr. Hercovitz's (*sic*) reputation in this [Ogden] area is that he is not honest and he is not ethical in his business dealings", and that the Committee had "not attempted to investigate the allegations of his improper actions in the specific complaint forwarded";

c) a letter from attorney Smith, to the Executive Secretary of the Board, noting that "It is understood that this information is confidential and that my name will not be mentioned", (T 368) referring to the stipulation and agreement in the T.C. Associates lawsuit with United Factors (*supra*, p. 12), the balance sheet which turned out to be inaccurate because of supervening circumstances, through no fault of petitioner's, though the letter of Mr. Smith does not show this ,and referring to the transfer of assets ascertained in the supplemental proceedings (*supra*, p. 17-18), adding that "After that hearing, the Judge said that he had not heard a better case of a transfer in fraud of creditors and asked me why I did not bring suit against his wife to recover the property he had transferred to her" (T 369-70).[3]

Petitioner had no opportunity to cross-examine Mr. Holther, the other members of the Investigating Com-

[3] No such comment of the judge's appears in the transcript of such proceedings, which is Ex. 5, found in the envelope in Vol. 3 of the Record on Appeal.

mittee, nor to use the Smith letter in his cross-examination of Mr. Smith.

The first of the federal questions herein was raised in petitioner's motion to strike these exhibits from the record, "for the further reason that the Petitioner was denied the right of * * * confrontation and cross examination by the failure to produce the evidence at time of Hearing * * *," a copy of which motion will be filed herewith. The second and fourth of the federal questions herein were raised in petitioner's mandamus petition, wherein he alleged that "The hearing violated the Constitutional rights of the Petitioner under the V and XIV Amendments of the Constitution of the United States" (T 402), and in Petitioner's Reply Memorandum to the Court (copy of which will be filed herewith) in which it is alleged (p. 1) "* * * that the very issue before this Honorable Court is the contention of the Petitioner, that there was no valid basis of evidenciary facts upon which to base the Findings, in that there was no Due Process of Law or Hearing, in a Legal and Constitutional concept." The third federal question raised here was not raised below (see n. 5, *infra,* p. 30).

The motion to strike the exhibits was denied in an order of the Utah Supreme Court, "subject to respective counsel making whatever argument they want concerning the evidence in the record," ruling further that "The matter is to be submitted on the basis of the record * * *". In the same order, the Court below elected to hear the proceeding by writ of mandamus (*infra,* pp. 10a-11a).

The Supreme Court of Utah did not expressly pass upon the constitutional issues, though of course it could not have denied mandamus without resolving the raised constitutional questions against petitioner. *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill,* 281 U.S. 673 (1930).

This petition follows.

## *REASONS WHY WRIT SHOULD BE GRANTED*

### POINT I

**The State's denial of the right to examine evidence during a Bar Admission Hearing, and to cross-examine thereon, with subsequent State use of such evidence upon court review, clearly conflicts with applicable decisions of this Court.**

Despite the assurances of the Board that everything adverse to petitioner would be presented at its hearing, it failed to disclose the Holther, Smith and Investigating Committee letters at the hearing, disclosing them for the first time in the record filed upon later judicial review. The Court below denied a motion to strike these letters from the record, and ruled that the matter was to be submitted on the record (*infra,* 10a-11a).

The decision below clearly conflicts with this Court's decision in *Willner* v. *Committee on Character and Fitness,* 373 U.S. 96 (1963).

### POINT II

**There was no evidence whatsoever of bad moral character below. The items found to indicate suspicion of petitioner's moral character have no rational connection with petitioner's fitness or capacity to practice law, and denial of admission to the bar for such reasons conflicts with the due process clause of the Fourteenth Amendment and with prior decisions of this Court.**

If any intelligible thesis emerges from the plethora of miscellaneous minutiae upon which the decision below

rested, it is that one or more business failures of corporations with which an applicant was connected during a 35-year business career, resulting in a "very poor"—though undeserved—business reputation amongst those who lost money as a result, plus suspicion, plus being a litigant, constitute proof of a lack of moral character, while no consideration is given to overwhelming affirmative proof of moral character except in the "ecclesiastical community." To state this proposition is to refute it. While a State may of course require good moral character before it admits an applicant to the bar, "* * * any qualification must have a rational connection with the applicant's fitness or capacity to practice law." *Schware* v. *Board of Bar Examiners,* 353 U. S. 232, 239 (1957). Moreover, the alleged facts relied upon in the Board's Findings frequently have no support whatsoever in the record—or contradict the record—, while none of the matters found can constitutionally be a basis for excluding petitioner from the Bar.

**A. Findings Completely Lacking Evidentiary Support.**

"* * * [O]fficers of a state cannot exclude an applicant when there is no basis for their finding * * *." *Schware* v. *Board of Bar Examiners, (Ibid.).* Yet the following Findings completely lack evidentiary support, and in some cases are clearly *contra* to the record:

1. In Finding No. 9 (*infra,* at p. 3a), it was found that Security Development "failed". However, it still exists, in good standing, and is solvent (*supra,* p. 11).

2. In Finding No. 16 (*infra,* at p. 4a), the Board found that petitioner served as President and general manager of R.C. Interiors until it went into bankruptcy in December, 1969 or January, 1970. In fact, petitioner had

ceased working for R.C. Interiors a year prior to its going into bankruptcy (*supra*, p. 13).

3. In Finding No. 23 (*infra* pp. 5a-6a), the Board found that there are unsatisfied judgments against petitioner. There is no support whatsoever for this finding in the record; the finding is simply untrue.

4. In Finding No. 24 (*infra* at p. 6a), the Board found a failure to make full disclosure re petitioner's alleged personal guaranty of obligations during the First Meeting of Creditors of T.C. Associates. The stenographic record of such meeting shows full disclosure (*supra*, pp. 13-15).

**B. Matters Which Have No Rational Connection With Petitioner's Moral Character.**

***1. The use of judicial forums.***

Adverse inferences were drawn from petitioner's resorts to the courts, whether successful or unsuccessful, and from his corporation's use of the Bankruptcy Laws enacted by Congress. This presents a substantial federal question not heretofore determined by this Court, but which was decided in a way probably not in accord with this Court's decision in *Schware, supra,* since there is no rational relationship between such actions and lack of moral character. *Per contra,* resort to the courts through counsel to vindicate alleged rights or to defend is in the highest tradition of our jurisprudence. *Cf.* Cardozo, J., in *Morningstar* v. *Lafayette Hotel Co.,* 211 N.Y. 465, 468, 105 N.E. 656, 657: "But the law, which creates a right, can certainly not concede that an insistence upon its enforcement is evidence of a wrong."

Thus, the Board and Court below unconstitutionally found derogatory the following legal actions of corporations of petitioner's or by which he was employed:

a. Reliable's lawsuit to set aside the fire insurance settlements, still pending, after two appellate victories by petitioner (Finding No. 7, *infra* at p. 3a).

b. Security Development's lawsuit for breach of lease, still pending after one appellate victory by petitioner (Finding No. 9, *infra* at p. 3a).

c. The bankruptcy petition of T.C. Associates,—the only corporation to go into bankruptcy when petitioner was still connected with it—, though not shown to have been brought about by any misfeasance of petitioner, but due to the unfortunate circumstances of a heart attack suffered by its attorney, resulting in a default, not fully vacated (Finding No. 11, *infra* at p. 4a).

d. Petitioner's unsuccessful attempt to set aside a stipulation (Findings No. 13 and 14 *infra*, at p. 4a).

e. Petitioner's defense of the action brought against him on an alleged guaranty, still pending (Finding No. 20, *infra* at p. 5a).

At no point was it ever suggested that any legal position taken by petitioner was frivolous or an abuse of process. At all times during litigation petitioner was represented by counsel. Under such circumstances, denial of bar admission predicated upon involvement in litigations (few, indeed, for a 35-year business career) is surely unrelated to petitioner's moral character, and must be set aside as a denial of due process.

It must also be noted that suits to set aside stipulations and settlements have been recognized by this Court,

as recently as February 24, 1972, in *D.H. Overmyer Co., Inc.* v. *Frick Co.*, —— U.S. ——, 40 LW 4221, and *Swarb* v. *Lennox*, —— U.S. ——, 40 LW 4227. Surely no adverse inference can properly arise from the mere bringing of such suits.

***2. The use of post-dated checks.***

There was neither claim nor showing that petitioner knew, when he caused the issuance of Reliable's post-dated checks, that any of them would not be honored. There was no showing of any constant pattern of non-honoring of checks. Of necessity, some post-dated checks do not clear because deposited before their date, or because anticipated cash flow may exceed actualities, as here (*supra*, p. 9). Since use of post-dated checks is a common method of financing, and since legally they amount to no more than promissory notes, the possible defaults on such notes bear no rational relationship to moral character, especially in the absence of any evidence that such checks were not later made good.

***3. Petitioner's being questioned as to whether the fire at Reliable was accidental.***

*Schware* tells us that even arrests may not be a basis for denial of bar admission. But petitioner was never arrested; the matter was never even presented to the District Attorney's office; there was neither claim nor showing at the hearing of any responsibility by petitioner for the fire. At worst, there was suspicion. But if even arrest cannot be a basis for denial of bar admission, and if mere suspicion cannot even be a basis for arrest—as this Court recently reiterated in *Papachristou* v. *City of Jacksonville*, —— U.S. ——, 40 LW 4216, 4220-1—then mere suspicion cannot constitutionally be a basis for denial of bar admission.

***4. The trust receipts.***

The failure of T.C. Associates to pay on the trust receipts, at a time when petitioner was no longer actually connected with it, (and for obligations incurred after he was no longer employed by it) (T 251, 253), has no rational relationship to petitioner's moral character. Even had his connection been then existent, neither the failure to segregate funds—expressly authorized by the creditor, the segregation being honored only in its breach,—nor the corporation's inability to pay over such funds is logically related to moral character.

***5. Forgetting a 32-year old letter.***

Petitioner's mere forgetting of a 32-year old letter bears no rational relationship to his moral character. There was neither allegation, claim nor finding that his lapse of memory was other than innocent, nor can any motive for giving erroneous testimony be conceived,[4] especially since petitioner's good moral character had been certified by the Investigating Committee after his letter was sent.

***6. Petitioner's reputation in the "ecclesiastical" and business communities.***

Though the record is almost bereft of reference to petitioner's reputation in the "ecclesiastical community in which he is active", *i.e.*, the Jewish community, the use of

---

[4] That the Board was grasping for every straw of suspicion is manifest by its crediting the testimony of attorney Smith, though Smith erroneously testified that the T. C. Associate's state receivership had been vacated only four years previously (T326-8), and gave erroneous testimony as to what petitioner had testified to at the First Meeting of Creditors of R.C. Interiors—held less than a month previously (see *supra* pp. 14-15).

this term by the Board in its Finding demonstrates that denial of qualification to take the bar examination was violative of due process because "invidiously discriminatory." *Schware* v. *Board of Bar Examiners, supra,* 353 U.S. at 239.

This would seem to be supported by the fact that petitioner's outstanding reputation amongst lawyers, judges, publishers, and other businessmen, was entirely ignored, which in itself would be *contra* to *Schware.* Moreover, the only "poor reputation" that petitioner was shown to have had was solely amongst those who had lost money in dealings with corporations with which petitioner had been associated, their attorneys, plus the insurance personnel who had been sued by Reliable (*supra,* pp. 16-17). Denial of admission to the bar by reason of an adverse reputation amongst enemies made in the normal course of business and litigation is arbitrary, unreasonable, and not rationally related to petitioner's fitness or capacity to practice law, especially when the overwhelmingly favorable evidence of reputation is totally ignored, and such evidence as there is re the reputation in the "ecclesiastical community" is discounted.

Moreover, in any event, a person's reputation has no rational connection *per se* with his fitness or capacity to practice law; not all reputations are deserved, as shown by the case at bar. A mere poor business reputation, without any evidence upon which it may properly be predicated, is not rationally connected with fitness to practice law. Due process was violated here.

### *7. Transfer of assets.*

In Findings 27 and 28, it was apparently ruled that petitioner's disposal of $156,000 of net assets between 1965 and 1967, a substantial part of which was to his wife, was

*per se* evidence of unfitness (*infra* at p. 7a). However, in the absence of a scintilla of evidence to show that any creditor was injured by such transfer, and in the total disregard of petitioner's explanation of the transfer (*supra*, pp. 17-18), such transfer has no rational relationship to petitioner's moral character.

The Board apparently tried to remedy this by noting that petitioner had a $156,000 net worth in February 1965, "Although the several corporations organized and operated by [petitioner] were unable to pay their bills and went into insolvency or bankruptcy * * *" (*infra* at p. 7a). However, T.C. Associates did not go into bankruptcy until a year later (1966); it is not surprising that petitioner then began to live on his assets; there was neither proof nor allegation that any personal transfers were in fraud of T.C.'s creditors. The only other corporation which became insolvent or bankrupt was R.C. Interiors, in 1969 (three years later), when petitioner was no longer active in it; the Reliable fire had occurred in 1961. Thus, there cannot constitutionally be any adverse inference drawn from the transfer.

### *8. The financial statement of T.C. Associates.*

In Finding 15, the Board noted that a statement of the corporate stock structure, signed by petitioner on behalf of T.C. Associates, did not accurately set forth the capital structure of the corporation and its assets as of its date. However, the statement had been prepared by a Certified Public Accountant, and there was no showing that petitioner's reliance upon a Certified Public Accountant's statement was lacking in good faith. The fact that the other stock subscribers later reneged upon their agreement can in no way rationally reflect upon the moral char-

acter of petitioner, in the complete absence of any showing that he knew the statement to be false when he signed it.

* * *

The denial of admission to petitioner, in the last analysis, rests upon no evidence whatsoever of lack of moral character. It therefore cannot stand under *Schware* v. *Board of Bar Examiners, supra.*

## POINT III

**The statutory standard, which permits denial of qualification for the bar because of failure to remove any and all reasonable suspicions of moral unfitness, is in conflict with the applicable decisions of this Court.**

Under Amended Rule IX of the Revised Rules of the Utah State Bar for Admission to the Bar, approved by the Supreme Court of Utah, the applicant has the burden of proving not only that he is possessed of good moral character, but that he "is entitled to the high regard and confidence of the public, and of removing any and all reasonable suspicion of moral unfitness".

Such standard, particularly that one must remove "any and all reasonable suspicions of moral unfitness", is void for vagueness, and for being arbitrary and unreasonable. Such requirement bears no relation to actual fitness, but only to fitness as established by the marketplace of gossip.

Indeed, this very case is an example of the perniciousness of this standard. For, as demonstrated above, the entire case against petitioner rests completely upon suspicion, not upon evidence. Mere suspicion, as this Court only recently reaffirmed in *Papachristou* v. *City of Jacksonville*, — U.S. —, 40 LW 4216, 4220-1, is not an acceptable standard under American jurisprudence, and is contrary to the due process clause.

Insofar as Rule IX embodies this standard, it conflicts with this Court's decision in *Papachristou, supra.* The Rule should accordingly be declared void.[5]

## POINT IV

### The miscellaneous factors relied upon below when taken together cannot make constitutional that which is unconstitutional when each is considered separately.

In the absence of a judicial opinion below, it cannot be determined whether the Supreme Court of Utah relied upon all or merely some of the Findings of the Board, especially since respondent argued below that the Court below could rely on only several of the factors. But if one or more of the Findings below did not comport with constitutional standards, then petitioner is clearly entitled to a hearing whose outcome should be determined solely on the basis of constitutional standards. *Stromberg* v. *California*, 283 U.S. 359, 368; *Williams* v. *North Carolina*, 317 U.S. 287, 292.

The same argument made below here was made in *Schware*, and was rejected by this Court, which said:

> "In the light of petitioner's forceful showing of good moral character, the evidence upon which the State relies * * * cannot be said to raise substantial doubts about his present good moral character.

---

[5] This point was not raised below. Since the Rule had been approved by the Supreme Court of Utah, it is difficult to conceive that any bar applicant would or could have the temerity to challenge that Rule before that Court. Since it is so plainly unconstitutional, it should nonetheless be reviewed here. *Terminiello* v. *Chicago*, 337 U.S. 1 (1949).

> There is no evidence in the record which rationally justifies a finding that Schware was morally unfit to practice law."

*Schware* v. *Board of Bar Examiners, supra,* 353 U.S. at 246-7.

So, too, here.

## CONCLUSION

**This Court should grant certiorari and the judgment below should be reversed.**

Respectfully submitted,

HERBERT MOXTE LEVY
*Attorney for Petitioner*
295 Madison Avenue
New York, New York 10017

[APPENDICES FOLLOW]

# APPENDIX A

BEFORE THE BOARD OF COMMISSIONERS

OF

THE UTAH STATE BAR

---

IN THE MATTER OF

The Application of SAM A. HERSCOVITZ for Permission to Take the Utah Bar Examination

No. 233

---

The above named Sam A. Herscovitz having filed an Application with the Board of Commissioners for permission to take the Bar Examination to be given during the month of March 1970, after having heretofore taken and failed the examination on three prior occasions, and the Board thereafter notified the said Sam A. Herscovitz in writing that it was not prepared to certify that he was of good moral character and fitness to practice law in the State of Utah as required by the Revised Rules of the Utah State Bar for Admission to the Bar; and the said Sam A. Herscovitz having, within ten days after such notification, filed a written request for a hearing pursuant to the provisions of Section 9-1, Rule IX, as amended, of the Revised Rules of the Utah State Bar for Admission to the Bar; and said hearing having been held on February 12 and 14, 1970, in conformity to said Rules, at which hearing the Applicant appeared in person and was repre-

*Appendix A*

sented by legal counsel, Clyde C. Patterson and Pete N. Vlahos; and the matter having been submitted and the Board (seven members participating),* being fully advised in the premises, now makes the following Findings and Conclusions:

FINDINGS

1. Sam A. Herscovitz is a resident of Ogden, Weber County, State of Utah, is presently 56 years of age, and has been a resident of said city, county and state since on or about 1922.

2. Applicant graduated from the University of Utah Law School in June 1937, with an L.L.B. degree.

3. From about 1934 up to January 1969, Applicant has been engaged in various business ventures and activities in Weber, Davis and Salt Lake Counties.

4. Particularly, from about 1934 until 1962 Applicant was actively engaged in the business known as Reliable Furniture Company in Ogden. This business was incorporated in 1945 as a family business; and thereafter Applicant served as the President and general manager and was the principal stockholder, holding approximately 36% of the stock.

5. In March, 1961, a fire occurred at the Reliable Furniture Store in Ogden which resulted in substantial damage to the merchandise in the store and ultimately caused the discontinuance of the business.

---

* [The Board's footnote hereto appears at the end of the Findings (*infra*, p. 7a), as in the original.]

*Appendix A*

6. At the time of the fire and for some time prior thereto, Applicant had caused to be issued certain postdated checks to Reliable's creditors and suppliers, which checks were not honored upon their presentation for payment.

7. In the investigation of the cause of the fire, Applicant was questioned concerning whether the fire was accidental. Although Applicant settled with the insurance companies for the loss sustained, he thereafter commenced legal action against the insurance companies, their agents and others, claiming coercion and intimidation in connection with the settlement of the loss, which action is still pending in the Courts.

8. In 1955 a corporation was formed known as Security Development, of which Applicant and his wife own 50% of the stock. Applicant was at all times President and general manager of this company which was engaged in business in Salt Lake City, operating a leased area in the FAIM Department Store.

9. That business failed and legal action was instituted by the corporation, through Applicant, to recover damages, pecuniary and punitive, against the lessor and others for alleged breach of conditions of the lease. The corporation is no longer active, except for such litigation.

10. Another corporation formed by Applicant in 1965 and of which he served as President and general manager during its operation was T.C. Associates. That corporation operated a general retail furniture business until it became involved in litigation in 1966 and filed proceedings under Chapter XI of the Bankruptcy Act.

*Appendix A*

11. Later T.C. Associates went into voluntary bankruptcy which bankruptcy proceedings terminated in 1969. Bankruptcy schedules disclosed $20,592.26 in assets (after satisfying preferred claims and costs of bankruptcy proceedings) to apply to the payment of claims of general creditors approved in the amount of $160,956.90.

12. In the course of proceedings in the case of United Factors v. T.C. Associates (Civil No. 165056 in the District Court of Salt Lake County) Applicant signed a Stipulation or Agreement to make certain payments on the amount owing to the Plaintiff therein.

13. Thereafter, Applicant refused to abide by the Stipulation, changed attorneys and filed a Motion with the Court to set aside the Stipulation, which was refused, and Judgment was entered.

14. This matter was finally appealed to the Supreme Court of Utah where the Judgment of the Lower Court was affirmed.

15. A statement of the corporate stock structure signed by Applicant on behalf of T.C. Associates and submitted to United Factors did not accurately set forth the capital structure of the corporation and its assets as of that time.

16. Applicant was a principal in the formation of a corporation known as R.C. Interiors which did business under the name of Pro Discount, also. He served as President and general manager of that business until it went into voluntary bankruptcy in December, 1969 or January, 1970.

*Appendix A*

17. That company was also engaged in the retail furniture business in the Weber-Davis County area until it went into bankruptcy.

18. Part of the financing of its operations was handled by "trust receipts", which were executed under a Power of Attorney, whereby the title to the merchandise shown on the "receipt" was vested in a third party; and the corporation agreed to transmit the funds received from the sale of such merchandise to the title holder, immediately upon receipt.

19. This was not done in many instances and upon checking into the matter on several occasions by the representative of such title holder, it was found that several items (representing an indebtedness of approximately $10,000) were sold "out of Trust", and upon demanding payment therefor, the corporation failed to pay.

20. In connection with that matter, legal action has been filed against the corporation and against Applicant upon a personal Guaranty signed by him.

21. Applicant, in his Answer in said action, has denied that he signed a personal Guaranty and further alleges that any document signed by him purporting to be a guaranty was not intended as a guaranty and was signed in blank. This matter is still pending before the Courts.

22. In the bankruptcy of R.C. Interiors there appear to be approximately $22,000 in assets with about $100,000 in admitted claims.

23. Applicant, individually, or corporations of which he has been president and general manager, have been in-

volved in many more legal actions brought by suppliers of merchandise or those who have extended credit. Judgments have been rendered against Applicant or corporations of which he has been the President and principal operating officer which remain unsatisfied.

24. Applicant has been examined under oath in connection with some of the legal actions and in the bankruptcy proceedings of the several corporations. Particularly, in the bankruptcy involving R.C. Interiors, Applicant failed to make a full disclosure to the Court with respect to his alleged personal Guaranty of certain indebtedness of the corporation.

25. At the hearing in this matter, Applicant volunteered the statement that his moral character had been questioned back in 1938 when he was seeking to take the Bar Examination a second time and that he had only recently, within the last few months, become aware of that investigation by chance reading of a Bar Bulletin published in 1938. On cross examination he admitted (on being shown a letter which he signed and sent to the Board of Bar Commissioners on December 15, 1938) that he had known of the investigation at that time and had written a letter asserting the publication to be libelous and petitioning the Board to take whatever action it could to remedy the effect of the "privileged libel".

26. Although Applicant appears to enjoy a good reputation among his family, friends and associates in the ecclesiastical community in which he is active, he has a very poor business reputation among those with whom he has dealt in buying merchandise for resale and in the field of credit and finance and elsewhere where he would be expected to be more directly involved if he were licensed to practice law.

*Appendix A*

27. Although the several corporations organized and operated by Applicant were unable to pay their bills and went into insolvency or bankruptcy, Applicant himself showed a net worth in February, 1965 of approximately $156,000.00.

28. Between February 1965 and September 1967 he had disposed of all of these assets, a substantial portion thereof having been turned over to his wife.

CONCLUSIONS

From the foregoing Findings the Board of Commissioners determines that Applicant has failed to meet the requirements of Rule IX, as amended, of the Revised Rules of the Utah State Bar for Admission to the Bar in that he has failed to establish that he is possessed of that moral character and entitled to the high regard and confidence of the public sufficient to be recommended for admission to practice law in the State of Utah.

The Board further concludes that since Applicant has failed to meet the requirements of said Rule IX, he should not be permitted to take the Bar Examination.

IT IS SO ORDERED.

Dated this 13th day of March 1970.

BOARD OF COMMISSIONERS OF THE UTAH STATE BAR

STERLING R. BOSSARD
President

Attest:

DEAN W. SHEFFIELD
Secretary

---

* Commissioners Lavar E. Stark and J. Robert Bullock did not participate in this decision, Commissioner Stark having disqualified himself and Commission (*sic*) Bullock not having attended the entire hearing.

# APPENDIX B

BEFORE THE BOARD OF COMMISSIONERS OF THE
UTAH STATE BAR

IN RE SAM A. HERSCOVITZ

ORDER RULING ON APPLICANT'S EXCEPTIONS TO
FINDINGS AND MOTION TO AMEND FINDINGS

No. 233

Applicant's Exceptions to Findings and Motion to Amend came on regularly to be heard by the Board of Commissioners* of the Utah State Bar on the 10th day of April, 1970, at the hour of 2:00 p.m. pursuant to notice. Mr. Sam A. Herscovitz appeared in person and was represented by his attorney of record, Peter N. Vlahos, who presented oral arguments on each of the Exceptions and Objections to the Findings in said matter and in support of the Motion to Amend.

The matter having thereafter been submitted and the Commission being advised in the matter, and after deliberation and discussion thereon, hereby amends the Conclusions in said matter by adding thereto the following immediately before the statement, "It is so ordered:"

> "In view of the foregoing Findings and Conclusions, the further question whether Applicant should be allowed to sit for a fourth examination is moot and no determination thereof is made."

---

* Commissioners Lavar E. Stark and J. Robert Bullock, having not participated in the original decision, took no part in the deliberations nor decision of the Commission.

## *Appendix B*

The Commission hereby affirms the Findings and Conclusions as amended, overrules the Exceptions and Objections to Findings and otherwise denies the Motion to Amend.

Dated this 17 day of April, 1970.

BOARD OF COMMISSIONERS OF THE UTAH STATE BAR

STERLING R. BOSSARD
President Utah State Bar

Attest:

DEAN W. SHEFFIELD
Executive Secretary

## APPENDIX C

SUPREME COURT OF UTAH
STATE OF UTAH
SALT LAKE CITY, UTAH

December 7, 1970

OFFICE OF THE CLERK

Vlahos and Gale
Attorneys at Law
312 Eccles Building
Ogden, Utah 84401

Att.: Pete N. Vlahos, Esq.

---

IN THE MATTER OF

the Application of SAM HERSCOVITZ for Permission to Take the Utah State Bar Examination,

Petitioner,

v.

BOARD OF COMMISSIONERS OF THE UTAH STATE BAR,

Respondent.

No. 12139

---

This day the Court agreed to proceed with the review of this matter on the basis of the petition for extraordinary writ; and the motion to strike the exhibits is denied subject to respective counsel making whatever argument they

want concerning the evidence in the record. The matter is to be submitted on the basis of the record, and on the briefs heretofore filed. Respective counsel may file further briefs if they so desire.

L. M. CUMMINGS,
Clerk

## APPENDIX D

IN THE
SUPREME COURT OF THE STATE OF UTAH

REGULAR OCTOBER TERM, 1970

February 1, 1971

In Re:

---

IN THE MATTER OF

the Application of SAM A. HERSCOVITZ To Take The Utah State Bar Examination,

Appellant,

TO THE BOARD OF COMMISSIONERS OF THE UTAH STATE BAR,

Respondent.

ORDER

No. 12139

---

Appellant's petition for an extraordinary writ in this case having been considered, it is now ordered that said petition be, and the same is, denied.

## APPENDIX E

SUPREME COURT OF UTAH
STATE OF UTAH
SALT LAKE CITY, UTAH

November 5, 1971

OFFICE OF THE CLERK

Dean W. Sheffield, Esquire
Secretary, Utah State Bar
203 Kearns Building
Salt Lake City, Utah 84101

---

IN THE MATTER OF
the Application of SAM A. HERSCOVITZ To Take The Utah State Bar Examination,

Appellant,

TO THE BOARD OF COMMISSIONERS OF THE UTAH STATE BAR,

Respondent.

No. 12139

---

This day petition for rehearing denied.

L. M. CUMMINGS,
Clerk

# APPENDIX F

CONSTITUTIONAL PROVISIONS AND REGULATIONS INVOLVED

Amendment XIV, United States Constitution, Section 1, Clause 2:

> "* * * nor shall any State deprive any person of * * * property without due process of law * * *."

Revised Rules of the Utah State Bar for Admission to the Bar, Adopted April 25, 1935, and Approved by the Supreme Court of Utah, July 13, 1935, with Amendments Effective January 1, 1961, Rule IX thereof:

"RULE IX (As amended)

MORAL CHARACTER

"SECTION 9-1. Every applicant must be of good moral character. Investigations in reference to the moral character of applicants may be informal, but shall be thorough, with the object of ascertaining the truth.

"In its sole discretion the Board may act in the first instance as to any applicant without requiring the applicant to appear before it, or the Board may require the applicant to appear before it and be sworn and interrogated. If upon such action or appearance the Board shall not be prepared to certify the applicant, it shall promptly notify the applicant that it cannot certify that he is of approved good moral character and general fitness to practice law. Such notification shall be sent him by Certified mail. "The applicant shall have the right to file a written request for a hearing within ten days after such notice, and a hearing shall be granted by the Board under the following rules of procedure:

*Appendix F*

1. The Secretary of the Board shall notify the applicant of:

   a. the date, time and place of such hearing;

   b. the matters adverse to applicant which were disclosed by the preliminary hearing or hearings;

   c. if such matters were based in whole or in part upon adverse statements from other persons, the names of such persons; and

   d. the applicant's right to be represented by counsel at the hearing, to examine and cross-examine witnesses, to adduce evidence bearing on the aforesaid adverse matters and upon the applicant's moral character and general fitness to practice law, and for such purpose to make reasonable use of the Board's subpoena powers.

2. The hearings before the Board shall be private unless the applicant shall request that they be public. The hearings shall be conducted in a formal manner, with the applicant having the rights heretofore referred to. The burden of proof shall be on the applicant to establish that he is possessed of good moral character and entitled to the high regard and confidence of the public, and of removing any and all reasonable suspicions of moral unfitness. The Board shall not be bound by the formal rules of evidence; it may in its discretion take evidence in other than testimonial form, having the right to rely upon records and other materials furnished to the Board

in response to its request for assistance in its inquiries; and it may in its further discretion determine whether evidence to be taken in testimonial form shall be taken in person at the hearing or upon deposition, but all testimonial evidence shall in either event be taken under oath. A complete stenographic record of the hearing shall be kept, and a transcript may be ordered by the applicant at his or her own expense.

3. If after such hearing the Board does not certify the applicant, it shall make written findings and conclusions and it shall deliver a copy thereof to the applicant."

* * *

SUPREME COURT, U. S.

IN THE

# Supreme Court of the United States

October Term, 1971

SUPREME COURT, U. S.
FILED
MAY 26 1972

No. 71-1262

SAM A. HERSCOVITZ,

*Petitioner,*

v.

BOARD OF COMMISSIONERS OF THE UTAH STATE BAR,

*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF UTAH

## BRIEF OF BOARD OF COMMISSIONERS OF THE UTAH STATE BAR IN OPPOSITION

JOHN S. BOYDEN
Tenth Floor Kennecott Building
10 East South Temple
Salt Lake City, Utah 84111
and
ALLEN H. TIBBALS
315 East Second South
Salt Lake City, Utah 84111
*Attorneys for Respondent*

Of Counsel:
JOHN S. BOYDEN, JR.
JOHN PAUL KENNEDY
STEPHEN G. BOYDEN
BOYDEN & KENNEDY
Tenth Floor Kennecott Building
10 East South Temple
Salt Lake City, Utah 84111
and
EARL STATEN
TIBBALS AND STATEN
315 East Second South
Salt Lake City, Utah 84111

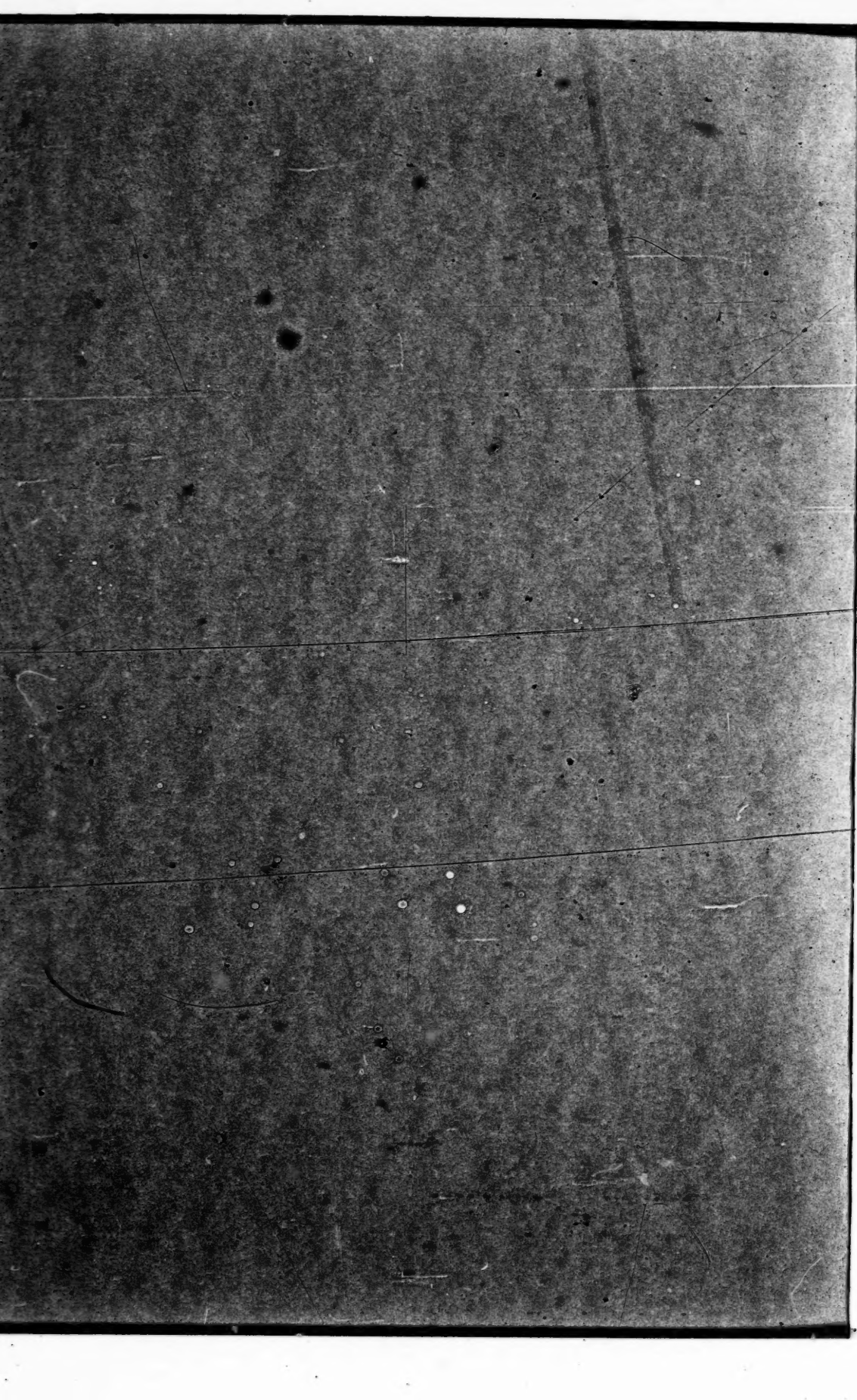

TABLE OF CONTENTS


| | Page |
|---|---|
| OPINIONS BELOW | 1 |
| JURISDICTION | 2 |
| QUESTIONS PRESENTED | 2 |
| REGULATIONS INVOLVED | 2 |
| STATEMENT OF THE CASE | 3 |
| SUMMARY OF ARGUMENT | 6 |
| ARGUMENT | 7 |
| POINT I | |
| THERE IS NO BASIS FOR GRANTING THIS PETITION BECAUSE THE DECISIONS BELOW DO NOT CONFLICT WITH THOSE OF ANY OTHER COURT AND RAISES NO SUBSTANTIAL FEDERAL QUESTIONS | 7 |
| POINT II | |
| THIS COURT SHOULD NOT ISSUE A WRIT OF CERTIORARI TO CONSIDER FEDERAL CONSTITUTIONAL ISSUES RAISED FOR THE FIRST TIME IN A PETITON FOR CERTORARI FROM A STATE COURT DECISION | 10 |
| POINT III | |
| PETITIONER WAS ACCORDED SUBSTANTIVE DUE PROCESS | 13 |
| POINT IV | |
| THERE IS NO EVIDENCE OF DISCRIMINATION | 16 |
| CONCLUSION | 17 |
| APPENDIX | |
| I | 19 |

TABLE OF CONTENTS (Continued)

Page

TABLE OF AUTHORITIES

CASES CITED

California v. Taylor,
353 U.S. 553 (1957) ..... 11

Cardinale v. Louisiana,
394 U.S. 437, 438 (1969) ..... 11

Crowell v. Randell,
35 U.S. (10 Pet.) 368, 9 L Ed. 458 (1836) ..... 11

Konigsberg v. State Bar,
353 U.S. 252 (1957) ..... 9

Lear v. Adkins,
395 U.S. 653 (1969) ..... 11

NLRB v. Pittsburgh S.S. Co.,
340 U.S. 498, 502 (1951) ..... 7

Papachristou v. City of Jacksonville,
..... U.S. ....., 40 L.W. 4216, (1972) ..... 9

Safeway Stores, Inc. v. Oklahoma Retail Grocers Ass'n, Inc.,
360 U.S. 334, 342, n. 7 (1959) ..... 11

Schware vs. Board of Bar Examiners,
353 U.S. 233 (1957) ..... 10

State Farm Mutual Automobile Ins. Co. v. Duel,
324 U.S. 154 (1945) ..... 11

Terminiello v. Chicago, 337 U.S. 1 (1949) ..... 11

Tyrell v. District of Columbia, 243 U.S. 1 (1916) ..... 11

Willner v. Committee on Character and Fitness,
373 U.S. 96 (1963) ..... 7

IN THE

# Supreme Court of the United States

October Term, 1971

---

No. 71-1262

---

SAM A. HERSCOVITZ,

*Petitioner,*

v.

BOARD OF COMMISSIONERS OF THE UTAH STATE BAR,

*Respondent.*

---

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF UTAH

---

## BRIEF OF BOARD OF COMMISSIONERS OF THE UTAH STATE BAR IN OPPOSITION

---

### OPINIONS BELOW

The Supreme Court of Utah did not render a written opinion. It entered an order denying Petitioner's petition for a writ of mandamus on February 1, 1971, a copy of which order is attached to Petitioner's Brief as Appendix D. On November 5, 1971, the Supreme Court of Utah denied Petitioner's request for a rehearing (see Appendix E of Petitioner's Brief). The findings and conclusions of the Board of Commissioners of the Utah State Bar are set forth in Appendix A of Petitioner's Brief.

## JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

## QUESTIONS PRESENTED

1. Whether this Court should reverse the decisions of the Supreme Court of Utah and the Board of Commissioners of the Utah State Bar, denying Petitioner the right to sit for a fourth bar examination (having failed three times before), when those decisions were rendered after a plenary hearing and where there has been no showing by Petitioner that those decisions were in any way based upon improper evidence.

2. Whether this Court should review a case heard and decided initially by the Board of Bar Commissioners for the State of Utah merely because Petitioner disagrees with the findings of said Board as upheld by the Supreme Court of Utah.

3. Whether this Court will invalidate one of the rules of the Supreme Court of Utah when the Petitioner admittedly did not first question the validity of that rule during the proceedings below but instead raised this point for the first time in his Petition for Certiorari.

## REGULATIONS INVOLVED

In addition to Rule IX, Supreme Court of Utah Rules cited by Petitioner in his Petition, and set out in Appendix F of the Petition, Rule X, Section 10-3, is also pertinent to this proceeding. It provides that any applicant who fails to pass the third examination will be re-examined only by special permission of the Board.

It is set out in full in Appendix I, hereof.

## STATEMENT OF THE CASE

This case comes to this Court following the refusal of the Supreme Court of Utah to issue a writ of mandamus compelling the Respondent Board of Bar Commissioners of the State of Utah to permit the Petitioner to sit for a fourth bar examination.

Because of the numerous omissions and the several misleading statements evident in Petitioner's Statement of the Case, it is necessary for Respondent to set forth a complete statement of the background of this controversy.

1. *Petitioner's Bar Examination Failures*:

Petitioner graduated from the University of Utah Law School in 1937. Having been certified, he took the bar examination that year but failed. The next year he again sat for the examination and failed.

In 1967, after continuing his work as a furniture salesman and store manager, which he had pursued for approximately thirty years, he again applied for permission to sit for the bar examination, asserting that he had in the preceding year audited classes at the University of Utah Law School, taken the Bar Review Course, and studied in the various available law libraries located in his area. (Application for Bar Examination February, 1968). Respondent granted permission to sit for that examination; however, Petitioner again failed.

In 1969 Petitioner applied for permission to sit for a fourth examination which was to be given in February 1970. On July 8, 1969, Respondent advised Petitioner that he would not be permitted to take the examination a fourth time because he had not made a sufficient showing for special consideration (R. 20).

Petitioner nevertheless filed a formal request in December 1969, and on January 29, 1970, was advised that Respondent was "not prepared to certify that you are of good moral character and general fitness to practice law in the State of Utah" (R. 21). Petitioner was further advised at that time that Respondent had "reserved decision on whether you should be permitted, in any event, to take a further Bar Examination in view of the provisions of Section 10-3 of Rule X, since you have heretofore taken the examination three times and failed" (R. 21).[1]

2. *The Hearing Below*:

Pursuant to Petitioner's request (R. 22) a hearing was scheduled by Respondent to afford Petitioner an opportunity "to examine and cross-examine witnesses to adduce evidence bearing on the matters adverse to you and upon your moral character and general fitness to practice law" (R. 23). Petitioner was further informed by Respondent at that time that he could use the subpoena powers of Respondent if he desired. Respondent also stated to Petitioner that he had been refused permission to sit for a fourth examination on the basis of "bad reputation and unethical business practice and upon the adverse statements" of four named individuals (R. 23).

A hearing was conducted before Respondent on February 12 and 14, 1970. Petitioner was represented by two attorneys at that time and presented eight witnesses on his behalf. Five other witnesses testified against Petitioner and were cross-examined by Petitioner's attorneys. A complete transcript was made of the hearing.

---

[1] Despite "the plethora of miscellaneous minutiae" presented in Petitioner's Brief, the Brief conveniently omitted noting the fact that Petitioner failed the examination three times.

3. *Respondent's Findings and Conclusions*:

On March 13, 1970, Respondent issued its findings and concluded that Petitioner "failed to establish that he is possessed of that moral character and entitled to the high regard of the public sufficient to be recommended for admission to practice law in the State of Utah" (R. 28).

On March 25, 1970, by his attorney, Petitioner filed exceptions to the findings (R. 30-35) and on April 17, 1970, the findings were affirmed with the following amendment:

> In view of the foregoing Findings and Conclusions, the further question whether Applicant should be allowed to sit for a fourth examination is moot and no determination thereof is made (R. 36).

4. *The Appeal and the Petition for Mandamus*:

On April 12, 1970, prior to the ruling by Respondent on the exceptions taken to its findings, Petitioner by his attorney, filed a notice of appeal to the Supreme Court of Utah.

On September 10, 1970, Petitioner by his attorney filed an Affidavit and Petition for Writ of Mandamus. Also, at that time, Petitioner by his attorney, made a motion to strike certain letters and documents submitted by Respondent to the Supreme Court because they were "incompetent as evidence for all of the reasons set forth hereinabove, as well as being redundant and irrelevant."

Briefs were filed by both parties and on December 7, 1970, the Supreme Court of Utah made the following ruling:

> This day the Court agreed to proceed with the review of this matter on the basis of the petition for extraordinary writ; and the motion to strike the exhibits is denied subject to respective counsel making whatever

> argument they want concerning the evidence in the record. The matter is to be submitted on the basis of the record and on the briefs heretofore filed. Respective counsel may file further briefs if they so desire.

A further brief was filed by Petitioner on January 27, 1971, and on February 1, 1971, the Supreme Court of Utah denied the petition for the writ.

## SUMMARY OF ARGUMENT

There is no basis for granting this Petition: the decision below is not in conflict with any prior decision of this Court or any other court; this case involves a peculiar set of facts and as such contains no principles the settlement of which is of importance to the public. Petitioner was granted due process. The record is clear that Respondent's and the Utah Supreme Court's determinations were based upon material properly in evidence.

This Court cannot review through a Petition such as this the Rules of a State Supreme Court when no attempt was made in the proceedings below to challenge such Rules.

Petitioner's own Brief, together with evidence not reflected therein, shows that the decisions below do not violate due process.

## ARGUMENT

### POINT I.

### THERE IS NO BASIS FOR GRANTING THIS PETITION BECAUSE THE DECISIONS BELOW DO NOT CONFLICT WITH THOSE OF ANY OTHER COURT AND RAISES NO SUBSTANTIAL FEDERAL QUESTIONS.

A. *No Conflict of Decisions*:

The reasons for which Certiorari may be granted were restated by this Court in *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502 (1951):

> Certiorari is granted only "in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a *real and embarrassing conflict of opinion and authority* between the circuit courts of appeal." [Citations omitted; emphasis added.]

See also Supreme Court Rule 19 (1) (b).

In this present case, it could hardly be said that the decisions below denying mandamus and the right to sit for a fourth bar examination gives rise to a real and embarrassing conflict of opinion and authority with any existing case.

The case of *Willner v. Committee on Character and Fitness*, 373 U.S. 96 (1963), cited by Petitioner as conflicting with the decisions below, is clearly distinguishable. In that situation, in marked contrast to the present case, this Court noted (at 373 U.S. 99):

> New York does not appear to have any procedure whereby an applicant for admission to the Bar is served with an Order to Show Cause by the Appellate Division before he is denied admission nor any other procedure that gives him a hearing prior to the Court's adverse action.

Not only does Utah have such a procedure, but it was carefully followed in this instance with notice, representation by counsel, cross-examination, a transcript, and a right to appeal.

To further distinguish *Willner,* it should also be noted that Mr. Willner had actually passed the New York Bar Examination, whereas the Petitioner herein had three times failed the Utah Bar examination.

Finally, Respondent's determination does not conflict with *Willner* because this Court ruled there that the New York Appellate Division's determination was based upon ex parte reports (373 U.S. at 106). In this case, however, the record is clear that the determinations below were made only on the basis of the evidence properly in the record. See the transcript of the hearing where Respondent members stated (Transcript of Hearing, pp. 123-24):

> [Member Neilsen:] It is my understanding that this Commission is here for the purpose of hearing evidence, and *its decision will be made upon the evidence that it hears . . . The Commission doesn't have any information as far as I am concerned upon which it intends to rely in any manner outside of what is being presented at this hearing.*
>
> * * * *
>
> [Member Bossard (President of the Utah State Bar):] [A]nything that the Board is going to use to make its decision on, you would have a right to have that information, and you would be given that privilege.
>
> [Emphasis added.]

In its ruling on the motion to strike exhibits, the Supreme Court of Utah stated in part:

> The matter is to be submitted *on the basis of the record,* and on the briefs heretofore filed. Respective

counsel may file further briefs if they so desire. [Emphasis added.]

In the proceeding below, the determinations were made on the basis of the record, not extraneous documents. Petitioner has made no contrary showing.[2]

The only other case cited by petitioner as conflicting with the decisions below is *Papachristou v. City of Jacksonville,* ..... U.S. ....., 40 L.W. 4216, (1972). That case also is distinguishable from the present situation. It involved a criminal conviction under the Jacksonville vagrancy ordinance and had nothing to do with a proceeding such as presented here. This Court stated (at 42240): "Arresting a person on suspicion . . . is foreign to our system." Respondent does not take issue with this ruling, but respectfully points out that an arrest for suspicion of vagrancy is vastly different from an application for admission to practice law.

The Court has recognized this difference in numerous ways. For example, in a criminal case the burden of proof rests on the state; in a proceeding such as presented here, however, the burden of proving qualification rests on the Petitioner. *Konigsberg v. State Bar,* 353 U.S. 252 (1957).

Thus, *Papachristou* does not pose any conflict with the present case.

---

[2] Petitioner has not shown that the questioned documents submitted by Respondent were in any way relied upon in making the determination below. There is substantial evidence in the record supporting that determination wholly apart from the questioned documents. In addition, the subject matter of the questioned documents was discussed at the hearing. It appears that the Executive Secretary of the State Bar simply submitted his entire file to the Supreme Court. This may have occurred because of the unclear designation of the record by Petitioner. It should be noted in passing that the Supreme Court of Utah heard this case as a petition for an extraordinary writ (mandamus) and not as a simple appeal. It is not conceded that the Supreme Court of Utah did not have the right, given these circumstances to review the entire file of Petitioner.

B. *No Substantial Questions*:

Petitioner has gone to the extreme in his attempt to make a case involving constitutional questions out of the facts in this matter. This court has not heretofore accepted petitions such as here presented to review the merits of lower court decisions solely because a party disagreed with the lower Court's determinations.

The only issue in this case is whether this Court should grant review to a Petitioner who, after a plenary hearing, is found by a State Bar Commission to be unfit to practice based upon evidence of a bad reputation and a lack of ethics in his business dealings.

The issue in this case is thus narrow, indeed. Only the Petitioner is affected. There are no sweeping problems such as presented in the *Willner* case, *supra,* or in *Schware vs. Board of Bar Examiners,* 353 U.S. 233 (1957), or in *Konigsberg, supra.*

This case was decided on the interpretation of the particular evidentiary facts presented. No constitutional principle was involved or presented to the Court below. Certiorari should not be granted.

## POINT II

## THIS COURT SHOULD NOT ISSUE A WRIT OF CERTIORARI TO CONSIDER FEDERAL CONSTITUTIONAL ISSUES RAISED FOR THE FIRST TIME TIME IN A PETITION FOR CERTIORARI FROM A STATE COURT DECISION.

Petitioner claims, in his Petition to this Court, at page 29, that Rule IX, Revised Rules of the Utah State Bar for admission to the Bar, is unconstitutional and void for reasons of vagueness.

This issue was never raised in the proceedings below. It has been long established that this Court will not decide federal constitutional issues raised for the first time in this Court on review of state court decisions. *Crowell v. Randell,* 35 U.S. (10 Pet.) 368, 9 L. Ed. 458 (1836). This Court has consistently followed the *Crowell* rule. *Cardinale v. Louisiana,* 394 U.S. 437, 438 (1969); *Safeway Stores, Inc. v. Oklahoma Retail Grocers Ass'n, Inc.,* 360 U.S. 334, 342, n. 7 (1959); *State Farm Mutual Automobile Ins. Co. v. Duel,* 324 U.S. 154, (1945).[3]

There is no distinguishing reason why this case should be handled any differently from principles previously enunciated by this Court. There is good reason why this Court should *not* review the issue untimely raised since the Supreme Court of Utah should certainly be granted the first opportunity to review a challenge to its own rules.

As pointed out in the *Cardinale* case, *supra,* at page 400, of the report thereof, there are valid reasons for requiring that a question first be considered by the lower court before being considered on review by this Court: (1) the record on those questions is very likely to be inadequate; (2) in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality; and (3) the issue may be blocked by an adequate state ground.

As authority for his position that this new issue should be ruled upon by this court even though it has not been passed upon by a lower court, Petitioner cites the case of *Terminiello v.*

---

[3] *Tyrrell v. District of Columbia,* 243 U.S. 1 (1916); *Lear v. Adkins,* 395 U.S. 653 (1969). This Court will not consider any issue which has not been briefed or orally argued below. (*California v. Taylor,* 353 U.S. 553 (1957)).

*Chicago,* 337 U.S. 1 (1949). We deem that case not in point. In *Terminiello* a city ordinance was attacked as being unconstitutional. The lower court's interpretation of the ordinance via an instruction to the jury was not objected to. It was agreed that since there was no objection to the instruction, the issue of the constitutionality of the ordinance was not contested and could not come before the Supreme Court. This Court, however, held that the fact that the parties did not object to the instruction was not controlling under the specific facts of *Terminiello* since the record made it clear that *petitioner at all times challenged the constitutionality of the disputed ordinance* under any construction thereof which would make his acts in violation of it.

In the present case this Petitioner did not in any manner raise the issue of the constitutionality of the above described Rule IX. The first mention of or reference to that issue, either directly or indirectly, occurred in the Petition to this Court. We submit that this issue, in light of the decisions above cited, should not be considered in determining whether Certiorari should be granted.

Finally, it should be noted that the position adopted by Petitioner with regard to Rule IX in his scramble to attract the attention of this Court is diametrically opposed to the position he adopted before the Supreme Court of Utah on the same Rule. Here, Petitioner claims Rule IX is "void for vagueness." Before the Supreme Court of Utah Petitioner referred to the "clarity" of the rule. (Argument filed by Petitioner on September 10, 1970, in support of Petition for Mandamus, p. 8).

## POINT III

## PETITIONER WAS ACCORDED SUBSTANTIVE DUE PROCESS.

The record below reveals that Petitioner was accorded substantive due process and that the findings and conclusions of Respondent were based upon substantial evidence. Petitioner has not made any showing that Respondent abused its power and authority or in any way acted capriciously. To the contrary, Petitioner's Brief to this Court reveals the justification and bases for Respondent's determination.

Petitioner's Brief does not deny the major findings of Respondent. Indeed, it merely attempts to "explain" them and to seek to have this Court become involved in the process of reconstruing evidence. No less than six pages of Petitioner's Brief are consumed with an ingenious attempt to explain away Petitioner's involvement in questionable transactions. Petitioner seeks to place the blame upon such factors as counsel, the certified public accountant and dishonored post-dated checks on which Petitioner merely missed his guess as to cash flow. He seeks to excuse the transfer of assets totaling $169,330.37 (in large part to his wife without consideration) during a period when the business in which he was involved was experiencing financial collapse, because no creditor was shown to have suffered thereby. However, he gives no reason for the suspicious transfer even though its timing and circumstances raise grave questions as to his intent.

In the same vein, Petitioner's Brief seeks to justify some of his dealings by asserting and reasserting several times that he has never yet been criminally convicted for any of his actions. Certainly, good moral character and fitness to practice law involves more than a lack of criminal convictions. Good moral

character and fitness to practice law are comprised of such qualities as trustworthiness — a quality which the evidence revealed Petitioner lacked.

One example of the several brought to light at the hearing demonstrating Petitioner's questionable ethics and lack of trustworthiness was the situation involving the dishonored stipulation which was discussed at great length on the record. In summary, Petitioner (after much discussion and with the advice of counsel and in his presence) executed a stipulation (prepared by his counsel) promising to pay a substantial sum of money in an attempt to resolve litigation against him (Transcript 241). Petitioner then refused to honor his commitment, embarrassing his first attorney to the extent that he withdrew from the case (Transcript, 243). When the matter was presented to the Court, Petitioner did not assert any legal or moral ground for setting aside the stipulation. After the lower court ruled against Petitioner, he then appealed to the Supreme Court of Utah which upheld the lower Court's ruling (Transcript, 244). Petitioner, therefore, eventually was compelled to honor his commitment, but only after much delay and cost and on order of the Supreme Court of Utah.

The attorney involved in this litigation against Petitioner was Alvin I. Smith, a member of the Utah Bar in good standing for thirty-five years. He testified against Petitioner at the hearing, and, unlike the other attorneys who had furnished endorsements for Petitioner, Mr. Smith had actually dealt with Petitioner in litigation, which was based upon Petitioner's questionable business actions. When asked whether Petitioner was qualified morally and legally and otherwise to practice law, Mr. Smith replied (at Transcript, 266):

> My opinion, I would never enter into a stipulation with this man [Petitioner] if he were ever admitted unless

> it was done in open court before the judge, and I then think that I would have to make a proffer of consideration, monetary consideration, to bind him. I don't have that opinion of any practicing attorney in the State of Utah. There isn't any attorney I wouldn't stipulate with, but this man I never would.
>
> [Question by Counsel for Respondent:] Well is it your opinion that he should not be permited to practice law in the State of Utah?
>
> A — Yes.

No authority is needed to support the proposition that a member of the bar, as an officer of the Court, should be completely trustworthy and should abide by his commitments. A lawyer whose word cannot be relied upon would be a menace to the process of justice. A person who lacks the quality of trustworthiness cannot be deemed fit to practice law.

Petitioner's Brief attempts to excuse the stipulation incident by the fact that he "acted through counsel" in seeking to dishonor his commitment. This gives cause for wondering what other types of conduct would be permissible in Petitioner's mind if he himself were granted the right to act as counsel.

Finally, Petitioner seeks to explain away the adverse testimony concerning his unethical business reputation by the surprising and almost ludicrous assertion that "only" those people who have suffered financially in their business dealings with Petitioner think he is unethical. The witnesses who testified on Petitioner's behalf were individuals who had not been involved in significant and complex business transactions with him, they were close personal friends, or they were attorneys who had not been involved in litigation with him. Their affirmative statements were not regarded by Respondent or the Supreme Court of

Utah as sufficient to establish good moral character and fitness in the light of the other substantial evidence in the record.

## POINT IV

## THERE IS NO EVIDENCE OF DISCRIMINATION.

The assertion that Respondent discriminated against Petitioner on the basis of his religion was first raised in the Petition in this court. Since this assertion touches on the integrity of the State Board of Bar Commissioners, it must be dealt with here even though on other grounds this Court could not consider such an untimely argument.

The question of discrimination appears to exist only in the mind of appellate counsel since it was not raised in the exceptions to Respondent's findings nor in the appeal to the Supreme Court of Utah.

It is not at all surprising that the Petitioner has not raised this issue below because all of the testimony of his religious activity was brought into the record by his *own* witnesses who testified affirmatively of Petitioner's activities in his religious community (see, e.g., Transcript, p. 18). Respondent made no negative finding concerning such activities and there is nothing in the record supporting Petitioner's unfortunate insinuation. A Petitioner who produces witneses on his own behalf to establish religious activity in his church and thus appeal to the Bar and Supreme Court of a state, that proudly claims a member of that religion as one of its greatest governors,[4] cannot in good grace now claim his own strategy has aroused religious prejudice. This is particularly so when Respondent did nothing more than find as Petitioner had asserted.

---

[4] Governor Simon Bamberger.

## CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a Writ of Certiorari should be denied.

Respectfully submitted,

JOHN S. BOYDEN
Tenth Floor Kennecott Building
10 East South Temple
Salt Lake City, Utah 84111

and

ALLEN H. TIBBALS
315 East Second South
Salt Lake City, Utah 84111
*Attorneys for Respondent*

Of Counsel:

JOHN S. BOYDEN, JR.
JOHN PAUL KENNEDY
STEPHEN G. BOYDEN
BOYDEN & KENNEDY
Tenth Floor Kennecott Building
10 East South Temple
Salt Lake City, Utah 84111

and

EARL STATEN
TIBBALS AND STATEN
315 East Second South
Salt Lake City, Utah 84111

# APPENDIX I

## RULE X

## THE BAR EXAMINATION

SECTION 10-1. Every "student applicant" must, after meeting the requirements of Rules V, VI, VII, VIII and IX hereof, successfully pass an examination, known as the Bar Examination, which shall be conducted either by the Board, or by a committee appointed by and acting under the supervision and direction of the Board, each year beginning on the first Wednesday in September, or at such other time or times as the Board may determine.

SECTION 10-2. The examination may be wholly written, or partly written and partly oral, in the discretion of the Board or examining committee, and shall consist of such questions as the Board or examining committee may select relating to law, use of law books, legal ethics and legal history.

SECTION 10-3. Any applicant who fails to pass two bar examinations shall be ineligible to take a third examination until one examination has intervened after the second failure. Any applicant who fails to pass the third examination will be re-examined only by special permission of the Board.

SECTION 10-4. Any applicant who fails to pass the Bar Examination and desires to take a subsequent examination need not file the Application for Admission to the Bar as provided in Rule VI hereof.

SUPR
FILED
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1262

SAM A. HERSCOVITZ,

*Petitioner,*

*against*

BOARD OF COMMISSIONERS OF THE UTAH STATE BAR,

*Respondent.*

## PETITIONER'S REPLY MEMORANDUM

HERBERT MONTE LEVY,
*Attorney for Petitioner,*
295 Madison Avenue,
New York, New York 10017.

## TABLE OF CASES


| | PAGE |
|---|---|
| Papachristou v. City of Jacksonville, 405 U.S. 156, 40 L.W. 4216 (1972) | 2 |
| Schware v. Board of Bar Examiners, 353 U.S. 232 (1957) | 2 |
| Skouser v. Smith, —— Utah 2d —— 493 P.2d 1003 (1972) | 4 |
| United Factors v. T. C. Associates, Inc., 21 Utah 2d 351, ——, 445 P. 2d 766, 768 | 2 |
| Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963) | 2 |


### Other Authority


| | |
|---|---|
| Rule IX, as amended, Sec. 9-1 of the Bar Rules | 3, 4 |

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1262

SAM A. HERSCOVITZ,

*Petitioner,*

*against*

BOARD OF COMMISSIONERS OF THE UTAH STATE BAR,

*Respondent.*

## PETITIONER'S REPLY MEMORANDUM

We respond herein only to the more blatant inaccuracies in Respondent's brief.

1. Respondent makes much of the fact that an applicant who fails to pass the third examination may be reexamined only by its special permission. That is entirely irrelevant here, since this question was ruled moot below by the Board and no determination made denying such permission. (See Petition, pp. 8a-9a). Contrary to Respondent's footnote 1 at page 4, Petitioner had indeed noted prior failure in Bar examinations (Petition, p. 6). But this is entirely unrelated to the question of Petitioner's moral character and the constitutionality of the standards used to determine it.

2. Respondent would have the Court believe that our only cases cited here as conflicting with the decision below were *Willner* v. *Committee on Character and Fitness*, 373 U.S. 96 (1963), and *Papachristou* v. *City of Jacksonville*, 405 U.S. 156, 40 L.W. 4216 (1972). Quite apart from its invalid attempts to distinguish those cases, Respondent fails to note, or to even attempt to deal with, *Schware* v. *Board of Bar Examiners*, 353 U.S. 232 (1957), repeatedly cited by Petitioner here, which was also cited below.

3. Respondent errs when it states that "No constitutional principle was involved or presented to the Court below." (Brief, p. 10.) The raising of the Constitutional questions is set forth on page 20 of our Petition.

4. Respondent stresses its claim that Petitioner "did not assert any legal or moral ground for setting aside the stipulation." (Brief, p. 14.) This is completely untrue. As noted in the decision in that case by the Supreme Court of Utah, *United Factors* v. *T. C. Associates, Inc.*, 21 Utah 2d 351, 353, 445 P. 2d, 766, 768:

> "Defendants [which included Petitioner] alleged in their motion that the stipulation provided that they pay a sum of money in excess of what they guaranteed, that if the payments were not made plaintiff could enter judgment and that defendants had a justifiable defense, and that the previous payments under the stipulations were made under a mistake of law and fact and that they should not be deprived of their day in court. Accompanying defendants' motion was an affidavit of Herscovitz stating that he made a mistake at the time of signing the stipulation in that he believed that the law made him obligated for the entire indebtedness rather than for the amount he signed as a guarantor and that he now believes that under the law his maximum liability is only the amount of the guarantee. He further stated that he believed

that plaintiff had permitted the corporate defendant to exceed the amount of the guarantee; and, therefore, the entire amount may be uncollectible. Defendant concluded that it would be a miscarriage of justice to permit plaintiff to take judgment under the stipulation in view of the newly discovered facts and law.'" Footnote 2 to the opinion recited as follows:

> "It is defendants' contention that the terms of the written guarantee, which specified no monetary limitation and provided that the terms and conditions may not be limited or amended without written consent, were in fact subsequently modified by an oral agreement confining the guarantors' liability to a $10,000 limit."

Nor, indeed, is there any support in the page cited by Respondent from the record, whose relevant parts are quoted in full in the margin below,[1] for Respondent's statement that petitioner's first attorney was "embarrass[ed] • • • to the extent that he withdrew from the case • • •." (Brief, p. 14.)

5. Respondent recites that Petitioner's position with regard to Rule IX "is diametrically opposed to the position he adopted before the Supreme Court of Utah on the same Rule", where, Respondent opines, Petitioner referred to the "clarity" of the rule. However, in the written argument referred to by Respondent, Petitioner had merely referred to the clarity of that part of the Rule providing for the right to cross-examine, and did not refer to that part of Rule IX permitting the denial of qualifica-

---

[1] "I told Mr. Saperstein on several occasions that under the terms of the stipulation it would be necessary for me to file such an affidavit and take judgment unless payments were forthcoming. He finally told me he was withdrawing from the case because Mr. Herscovitz told him that he was not going to abide by the stipulation. He wanted to contest the matter."

tion for failure to remove any and all reasonable suspicions of moral unfitness. The paragraph of such written argument, from which the word "clarity" was taken out of context by Respondent, is reproduced in full in the margin below.[2]

6. Respondent makes much of the unsupported opinion of one Alvin I. Smith, Esq., who Respondent recites is "a member of the Utah Bar in good standing for thirty-five years" (Brief, p. 14), because Mr. Smith would never enter into a stipulation with Petitioner, presumably because Petitioner had once sought to set aside a stipulation (*supra*, p. 2). Interestingly enough, Mr. Smith himself recently unsuccessfully sued to set aside his own promissory note on the ground of mutual mistake, which note he had himself drafted. The Supreme Court of Utah found a unilateral mistake on his part, at best, and denied him the requested permission to set aside his own note. *Skouser* v. *Smith*, —— Utah 2d ——, 493 P.2d 1003 (1972).

---

[2] "Rule IX, as amended, Sec. 9-1 of the Bar Rules is the statutory and notice giving statute of the law governing admission to practice in the State of Utah. This rule provides:

> The Secretary of the Board shall notify the applicant of:
>
> The matters adverse to applicant which were disclosed by the preliminary hearing or hearings:
>
> If such matters were based in whole or in part upon adverse statements from other persons, the names of such persons; and
>
> The applicant's right to be represented by counsel at the hearing, to examine and cross examine witnesses * * * and for such purpose to make reasonable use of the Board's subpoena powers.

"Despite the clarity of this rule the Board did not produce at the Hearing either in person or by Affidavit, David Holther, John Allen, Ray Twelves, any member of the Weber County Committee or any letters or reports of same. The Petitioner was totally deprived of any right of cross examination or confrontation in derogation of every concept of Federal and State constitutional rights, privileges and immunities as has been herein set forth."

## CONCLUSION

**This Court should grant certiorari and reverse the judgment below.**

Respectfully submitted,

HERBERT MONTE LEVY,
*Attorney for Petitioner,*
295 Madison Avenue,
New York, New York 10017.